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### Virtual Schools in Wisconsin Dealt a Blow By Wisconsin Court of Appeals

By Tom O'Day & Thomas Shorter

On December 5, 2007, the Wisconsin Court of Appeals, District II, determined in a long-awaited decision that the Wisconsin Virtual Academy (WIVA) was in violation of three Wisconsin statutes. *Stan Johnson v. Elizabeth Burmaster*, Appeal No. 2006AP001380 (Wis. Ct. App., December 5, 2007). WIVA is an online virtual education program operated by the Northern Ozaukee School District. The district employs both licensed administrators and teachers. The educational program requires parents to work with their children on assignments and assessing progress. Numerous students across Wisconsin attend WIVA through the Wisconsin Open Enrollment Law. The Court of Appeals ordered that the Wisconsin Department of Public Instruction (DPI) refrain from making pupil transfer payments under the open enrollment law to WIVA. Initial press reports indicate that the district, and other parties adversely affected by the decision, intend to appeal the matter to the Wisconsin Supreme Court, setting up a determinative decision on virtual charter schools under current Wisconsin law.

#### *Public Charter School Statute Violation, § 118.40(3)(c), Wis. Stats.*

The first issue addressed by the court of appeals was whether WIVA violated Wis. Stat. § 118.40(3)(c), which provides that a school board may not enter into a contract to establish a charter school located outside the school district. The court of appeals held that WIVA was physically located both inside the Northern Ozaukee School District and outside the district. Because of the online nature of the WIVA program, where students access coursework from their computers across Wisconsin and WIVA teachers work throughout the state, the court of appeals concluded that the charter school is a school located outside of the district boundaries.

#### *Open Enrollment Statute Violation, § 118.51, Wis. Stats.*

The second issue was whether the operation violated Wis. Stat. § 118.51, the open enrollment law, because the students were not actually “attending” school in the district. The open enrollment law allows parents to apply for their children to attend school in a school district other than the one in which they reside. The court of appeals concluded that the nonresident pupils were attending school outside the district because, in part, WIVA was located outside the district.

#### *Teacher Licensure Statute Violation, § 118.19(1), Wis. Stats.*

Finally, the court of appeals addressed whether the educational process at WIVA violated Wisconsin’s teacher licensure requirement at Wis. Stat. § 118.19(1). The court of appeals looked to both the DPI’s definition of “teach” in the administrative code, as well as WIVA’s official description of the parents’ role in the educational process. According to WIVA, parents were to assist with “fulfillment of attendance requirements, continuous progress with the K-12

*The following is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.*

## Virtual Schools (continued)

curriculum, participation in regular teacher conference calls, monthly submission of student's work samples, and participation in State testing programs." The court of appeals found that the district did not dispute that parents work one-on-one with a pupil, presenting the lesson, answering questions and assessing progress. These facts led the court of appeals to conclude that by offering a program where parents are supposed to "teach," WIVA's program violated the prohibition having unlicensed teachers in a virtual school.

**The Court took extreme care to point out that it was deciding the case not based on the policy arguments for or against virtual charter schools, but rather based on the clear and unambiguous language of Wisconsin law.**

In the end, this case will likely be appealed to the Wisconsin Supreme Court, and the final outcome will again await another judicial decision. Whether the Wisconsin Legislature weighs in on the issues presented in this case remains to be seen.

If you have any questions on how the decision impacts students that attend a virtual school program, or how it affects virtual program operations, please contact any member of our School Law Team. ♦

### *Legislative Fix Suggested by Court of Appeals*

The court took extreme care to point out that it was deciding the case not based on the policy arguments for or against virtual charter schools, but rather based on the clear and unambiguous language of Wisconsin law. The court stated:

[O]ur job is not to bend the statutory framework to fit WIVA. If, as its proponents claim (and its opponents dispute), WIVA has hit upon a bold new educational model that educates pupils in a way equal to traditional school at a fraction of the cost, then the legislature may well choose to change the law to accommodate WIVA and other schools like it. However, as the law presently stands, the charter school, open-enrollment and teacher certification statutes are clear and unambiguous, and the district is not in compliance with any of them.

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